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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LEOZIE PEARSON, JR. and CAROL PEARSON,

Petitioners,

vs.

HARRISON DUCK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a private person alone, or acting in conspiracy with a state actor, violate the "full and equal benefit" or the "like punishment" provisions of 42 U.S.C. Section 1981, even if that private person could not alone cause all of the resulting harm to the victims?

2. Do the "full and equal benefit" or "like punishment" provisions of 42 U.S.C. Section 1981 provide for a race-based, malicious prosecution type of action against a private individual, who, acting alone or in conspiracy with a prosecutor, pursues non-meritorious criminal charges against another private individual for racial and ulterior purposes?

3. Do the "like punishment" and the related portions of 42 U.S.C. do more than simply remove any legal disabilities from Afro-Americans to sue, be a party, testify, or enforce a contract, by statutorily providing that punishment, pains, penalties, taxes, licenses, and exactions of every kind shall not be based on one's race?

4. Must a plaintiff join an immune state actor, when bringing an action against a private individual, who has conspired with that state actor to violate 42 U.S.C. Section 1981?

5. Should an appellate court sustain the dismissal of a complaint for failure to join a party, or for failure to sufficiently allege a conspiracy with a state actor, when neither such defense was raised in the defendant's 12(b) motion, and the plaintiffs filed a 56(f) affidavit on the state action issue?

6. Should the trial court on remand reconsider exercising jurisdiction over the pendent state claims, if the federal claim is reinstated?

STATEMENT OF INTERESTED PARTIES

All interested parties are listed in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Leozie Pearson, Jr. and Carol Pearson, husband and wife, plaintiffs and appellants in the proceedings below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on the 4th day of April, 1989, rehearing denied on the 27th day of July, 1989.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals filed on April 4, 1989, and that Court's denial on July 27, 1989, of the Pearsons' request for rehearing is reproduced in the accompanying Appendix. (A. 106, 112). The memorandum opinions and orders of the United States District Court for the Northern District of Ohio,

filed on September 21, 1987, September 24, 1987, and December 31, 1987, are also reproduced in the accompanying Appendix. (A. 66, 78, 79, 81, 105).[1]

JURISDICTION

The judgment of the Court of Appeals was filed on April 4, 1989. Petitioners' petition for rehearing and/or rehearing en banc was denied on July 27, 1989. This petition, pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, was filed within 90 days. The jurisdiction of this Court is founded on 28 U.S.C. Section 1254(1).

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[1] References to pages of the accompanying Appendix will be cited as "(A. ___)."

STATUTES INVOLVED

42 U.S.C. Section 1981. Equal rights under the law:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT OF THE CASE

Since this case was dismissed on a 12(b) motion, the appellate courts must deem the facts to be as alleged by the Petitioners in their Complaint. Estelle v. Gamble, 429 U.S. 97 (1976).

Petitioners, Leozie Pearson, Jr. and Carol Pearson (hereinafter the "Pearsons"), husband and wife, are

Afro-Americans residing in East Liverpool, Ohio. The Pearsons have a teenage son, Leozie Pearson, III. Respondent, Harrison Duck, a white male, also resided in East Liverpool. Duck has a teenage daughter, Kelly Duck. (Complaint, paras. 2-3, 7-8)(A. 14-15).

Sometime prior to September, 1983, the black son and white daughter commenced an interracial friendship. Both sets of parents disagreed with and attempted to break up this friendship. Nevertheless, the white daughter continued to call the Pearsons' residence for their son, but would hang up, if anyone other than the son answered. Duck asserted that the Pearsons' son used this same technique, when attempting to call Kelly Duck. Both the teenagers desired the telephone calls from each other.

Following a meeting by both sets of parents, Mr. Pearson directed his son to cease making telephone calls to the Duck residence and strongly disciplined his son regarding his prior calls. Nevertheless, Duck knew, or should have known, that his daughter was continuing to make such calls to the Pearsons' son after the parental meeting. (Complaint, para. 16-23) (A. 19-23). Duck knew, or should have known, that any calls from the Pearsons' residence to Kelly Duck were not for harassment purposes. (Complaint, para. 19) (A. 20-21).

Having failed to stop the interracial friendship, Duck shortly before September 16, 1983, and in a further effort to end the relationship, brought telephone harassment criminal charges with the City of East Liverpool, Ohio,

against Leozie Pearson, Jr., the father, alleging that the father was responsible for harassing telephone calls by his son to the Duck residence. Duck continued to encourage and conspired with the Law Director and City Solicitor of East Liverpool to pursue these criminal charges against Mr. Pearson. (Complaint, paras. 9, 11, 26)(A. 15-17, 24).

On March 8, 1984, Leozie Pearson, Jr., the father, was found guilty by the Municipal Court of telephone harassment and sentenced to thirty (30) days in jail and fined Two Hundred Fifty Dollars ($250), though these penalties were suspended with costs charged against Mr. Pearson. On June 25, 1985, an Ohio appellate court reversed Mr. Pearson's criminal conviction finding that Ohio's "speedy trial" provisions had not been

complied with and that the State had failed in its burden of proof to establish the crime.[2]

After East Liverpool began pursuing the criminal charges against her husband, Mrs. Pearson attempted to bring similar telephone harassment charges against Duck based upon similar allegations due to his daughter's continuing calls to the Pearson residence. However, the City, allegedly in conspiracy with Duck, not only refused to pursue Mrs. Pearson's charges against Duck, it pursued additional criminal telephone harassment charges in 1984 against her Afro-American

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[2]While the state appellate court's reversal was based upon the "speedy trial" provisions, the appellate court, which under Ohio law must rule on all assignments of error, see Section 2505.21 of the Ohio Revised Code, also found that the criminal conviction was against the manifest weight of the evidence. (A. 10, 12).

son (though not against the white daughter). (Complaint, para. 24-26) (A. 23-24).

On June 23, 1987, the Pearsons, relying on 28 U.S.C. Sections 1331, 1343, 2201, and 42 U.S.C. Section 1988, brought an action against Duck in United States District Court for the Northern District of Ohio. In their first cause of action, the Pearsons alleged that Duck, individually and in conspiracy with the City, deprived them, because of their race, of their statutory rights to sue, be parties, give evidence, and to their statutory right to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white persons, as protected by

42 U.S.C. Section 1981.[3] In part, the Pearsons alleged that they were denied the "full and equal benefit" of the laws and were not subjected to "like

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[3]While the Pearsons also alleged an "interference with contract" type of claim under Section 1981, regarding the additional burdens placed on their enjoyment of their telephone contract, they are not seeking to appeal that portion of their dismissed Complaint. The Pearsons also brought three state tort actions, an interference with contract claim, Mrs. Pearson's loss of consortium of her husband, and her loss of consortium of her son. If that portion of the Section 1981 claim, that is being appealed, is reinstated, the Pearsons also seek on appeal a reconsideration of the discretionary dismissal of their pendent state claims, particularly since a state trial court has since dismissed these state claims. The state torts were re-filed in state court after the federal trial court declined to exercise pendent jurisdiction after dismissing the federal claim. The state court then dismissed the re-filed state torts since, in its view, the federal action had resolved the state, as well as, federal claims.

punishment" of the laws because Duck, individually and in conspiracy with the City, processed to trial criminal telephone harassment charges against Mr. Pearson, while conspiring to deny the Pearsons the same benefit to pursue similar charges against and/or obtain like punishment for Duck, when the Pearsons sought to pursue a similar criminal action against Duck. (A. 13-35).

Rather than filing an Answer to the Complaint, Duck, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, filed a motion to dismiss. Duck argued that the Complaint was time barred. Duck also argued that the Complaint should be dismissed, since the Pearsons did not allege that they had been denied their right to contract, and since the

Pearsons failed to allege that similarly situated individuals of the opposite race were treated different from them. Duck further construed the Complaint as raising independent constitutional torts and, therefore, argued that the alleged Fifth and Fourteenth Amendments claims were not supported by the requisite "state action". Duck asserted that an independent constitutional tort could not be pursued under Sixth Circuit law and that the constitutional torts were also time barred. (A. 36-39).[4]

In his 12(b) motion, Duck did not argue that the Pearsons insufficiently described the conspiracy between the City

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[4]The Pearson's position, that they had not brought independent constitutional torts, was sustained by the trial court. (A. 101-03).

and Duck, nor did Duck argue in his motion that there was a "state action" component to Section 1981 (as opposed to the alleged constitutional torts). Thus, Duck should not be permitted to raise these arguments on appeal.

Nevertheless, the Pearsons instituted discovery that in part sought information related to Duck's "state action" defense to the constitutional torts. Such discovery would also be relevant to any "state action" defense to the Section 1981 claim. An affidavit, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, regarding inter alia the "state action" outstanding discovery request (which was attached to the affidavit), was filed by the Pearsons. (A. 40-65).

Initially, the trial court dimissed the Complaint solely on statute of

limitations grounds. (A. 76). However, after being informed by Duck that the Sixth Circuit had recently changed its position on the statute of limitations for a Section 1981 action, the trial court vacated its judgment and sought further briefing on the limitations issue from the parties. (A. 79-80).

On December 31, 1987, the trial court found that the Complaint was timely filed, though dismissed the Section 1981 claim for failure to state a claim. The trial court reasoned that there were no allegations of interference with their telephone service. (A. 81, 96, 99-101). However, the trial court did not address the other arguments raised by the Pearsons, regarding the "equal benefit" or "like punishment" portions of Section 1981. (A. 81-104). Having dismissed the

federal claim, the trial court declined to exercise pendent jurisdiction over the state tort actions. (A. 102).

On appeal the Sixth Circuit upheld the dismissal of the Complaint. Unlike the trial court, the Sixth Circuit addressed the Pearsons' "equal benefit" and "like punishment" arguments. Despite the Rule 56(f) affidavit, the Sixth Circuit rejected the Pearsons' arguments, because Duck "alone" could not have caused the Pearsons' harm:

> "The Pearsons also claim that the trial judge did not address their claims of violation of the 'full and equal benefits' and 'like punishment' provisions of section 1981. However, it should be kept in mind that, although the Pearsons have alleged deprivations of the 'full and equal benefits' and 'like punishment' clauses of section 1981, as well as denial of their rights to sue and be parties, they have named only Duck as a defendant in this suit. If there is an unfairness in the fact that Pearson was prosecuted for conduct

> apparently similar to that for which Duck was not prosecuted, it cannot be blamed on Duck alone. The Pearsons imply that Duck and the Law Director and/or Solicitor General conspired to deprive them of their rights. However, the Law Director and/or Solicitor General is not named in the suit; and Duck alone could not have caused this type of harm."

(Emphasis in original) (A. 111). While the Sixth Circuit found "many of the actions surrounding this case to be reprehensible," it "did not think that the actions brought by the Pearsons are the proper means for redressing the situation." (A. 111).

Since the Pearsons believe Section 1981's "equal benefit" and "like punishment" provisions are an appropriate vehicle for seeking redress of Duck's reprehensible actions and further believe that the test applied by the Sixth Circuit, regarding whether Duck acting

"alone" could have caused the Pearson' harm, was inconsistent with this Court's prior precedents, the Pearsons timely sought a rehearing and/or rehearing en banc. This request was denied on July 27, 1989. (A. 112).

REASONS FOR GRANTING THE WRIT

A. A PRIVATE PERSON ACTING IN CONCERT WITH A STATE ACTOR MAY VIOLATE THE "FULL AND EQUAL BENEFITS" AND/OR "LIKE PUNISHMENT" PROVISIONS OF 42 U.S.C. SECTION 1981.

It is now settled law that Section 1981 reaches private conduct and that a private cause of action exists to enforce at least the "make and enforce contracts" provision of this statute. Patterson v. McLean Credit Union, 491 U.S. ___ (1989); Runyon v. McCrary, 427 U.S. 160 (1976);

see, Jett v. Dallas Independent School District, 109 S.Ct. 2702, 2724 (1989). This case deals with the extent to which the "full and equal benefit" of all laws and the "like punishment" provisions of Section 1981 reach private conduct.

The Pearsons alleged that Duck conspired with a state actor, the Law Director and/or Solicitor General of East Liverpool, Ohio, to deny them their full and equal benefits of all laws and to subject them to unlike punishments, because of their Afro-American race. The Pearsons alleged that they were denied equal benefits and subjected to unlike punishments, when East Liverpool at Duck's continual urging pursued criminal telephone harassment charges against Mr. Pearson, the father, while refusing to pursue similar criminal charges against the white father.

When Duck filed his 12(b) motion to dismiss the Complaint, he did not allege that the Pearsons insufficiently alleged this conspiracy, nor did he argue that there was a "state action" component to Section 1981. While the Pearsons raised the "equal benefit" and "like punishment" provisions in their Complaint and in their opposition to the 12(b) motion, the trial court did not address this issue. However, the Sixth Circuit upheld the dismissal of the Complaint's allegations, regarding equal benefits and the like punishment allegations, because the Pearsons did not name, as a party, the Law Director and/or Solicitor General, and because, according to the Sixth Circuit, Duck "alone" could not have caused the harm to the Pearsons. Apparently, the Sixth Circuit believed

that the Law Director or Solicitor General were indispensable parties, and/or that, even if Duck conspired with these state actors, he could not be held liable for his co-conspirators actions.

The Sixth Circuit's decision is in conflict with this Court's holding that the Law Director and/or Solicitor General are not indispensable parties, Dennis v. Sparks, 449 U.S. 24 (1980), and this Court's holding that a private individual involved in a conspiracy with state actors, all of whom were absolutely immune, can still be sued under federal civil rights statutes. Tower v. Glover, 467 U.S. 919 (1984). Therefore, the Sixth Circuit's decision cannot be sustained based upon an allegation that the prosecuting state actors, who are absolutely immune in this type of federal

action, were not joined as parties. If Duck acted in conspiracy with immune state actors, he still may be subjected to liability under Section 1981. Id.

The Sixth Circuit's decision also should not stand on the basis that the Pearsons did not establish, or sufficiently allege, state action and/or a conspiracy with a state actor. The 12(b) motion did not challenge the sufficiency of the conspiracy allegation. Consequently, there was no reason for the Pearsons to even address this issue, when they opposed the 12(b) motion. Indeed, Duck may have waived his right to raise this issue by failing to include it in his 12(b) motion. Brule v. Southworthz, 611 F.2d 406 (1st Cir. 1979).

Nevertheless, the Rule 56(f) affidavit should have prevented the

dismissal of the Complaint on a "state action" basis. At best, the trial court (even if it had been presented with and considered such a defense), should have required a more definite statement, rather than dismissing the action. Innovative Digital Equipment, Inc. v. Quantum Technology, Inc., 597 F.Supp. 983 (N.D. Ohio 1984).

Since Duck could have acted "under color of law" by conspiring with the prosecutor, Briscoe v. LaHue, 460 U.S. 332, 331n.7 (1983), the Pearsons sufficiently stated a claim under the "equal benefit" and/or "like punishment" provisions of Section 1981, even though they did not name the prosecuting attorneys as parties. Id. The Pearsons submit that these provisions of Section 1981 permit an action against a private

party that is similar in nature to a state tort, race-based, malicious prosecution action. See, Bouquette v. Clemmer, 626 F.Supp. 46, 49-50 (S.D. Ohio 1985). Consequently, if Duck initiated, participated in, conspired with, and/or encouraged the continued pursuit of a criminal action against Mr. Pearson, and then his son, because of the Pearsons' race, while successfully conspiring with the prosecuting attorney to prevent the same type of criminal action against him (despite similar activity by his white daughter), a cause of action has been stated under Section 1981. Id.

While the Pearsons recognized that Duck alone could not have processed the criminal charges through trial without the assistance of the State, this should not result in a dismissal of the

Complaint. Once a person becomes a member of a conspiracy, that person is responsible for all that may be or has been done by his co-conspirators. United States v. Adamo, 742 F.2d 927, 943-44 (6th Cir. 1984); United States v. Lester, 363 F.2d 68 (6th Cir. 1966); Brown v. United States, 204 F.2d 247 (6th Cir. 1953).[5] Thus, if Duck was part of a conspiracy, he can be held responsible, as well, for the State's actions.

A writ of certiorari should be granted to further establish the substantive federal law regarding the extent to which the "equal benefit" and

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[5]Since the conspiracy provisions in 18 U.S.C. Section 242 should be read co-extensively with the civil provisions of federal civil rights statutes, Dennis, supra at 29n.5, these criminal cases may be relied upon for establishing guidelines regarding civil conspiracies.

"like punishment" provisions of Section 1981 reach private conduct. The Writ also should be granted, so that this Court can reaffirm that Section 1981 reaches private conduct, even when that private conduct alone may not cause all of the harm, when that conduct is part of a conspiracy with a state actor.

B. THERE IS NOT A "STATE ACTION" COMPONENT TO THE "EQUAL BENEFIT" AND/OR "LIKE PUNISHMENT" PROVISIONS OF 42 U.S.C. SECTION 1981.

Alternatively, the Pearsons submit that, even if they had not sufficiently alleged a conspiracy with a state actor, or even if they had not submitted a 56(f) affidavit regarding the "state action" issue, they sufficiently stated a claim under the "equal benefit" and/or "like punishment" provisions of Section 1981,

because there is no "state action" requirement for any of Section 1981's protections. The Pearsons recognized that the lower courts are split on this issue and that this Court may not yet have resolved this issue. Compare, Runyon, supra; Gannon v. Action, 303 F.Supp. 1240 (E.D. Miss. 1969), aff'd on other grounds, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F.Supp. 894 (E.D. Miss. 1969), with, Hall v. Pennsylvania State Police, 570 F.2d 86, 91 (3d Cir. 1978); Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978); Shaare Tefilia Congregation v. Cobb, 606 F.Supp. 1504 (D. Md. 1985).

A comparison of the language in Section 1981 with its companion statute,

42 U.S.C. Section 1983, clearly establishes that Congress knew how to inject a "state action" and/or "color of law" component, when it so chose. Since Congress did not explicitly insert a state action and/or color of law requirement, when it reenacted Section 1981, this statute should not be interpreted as requiring such state action, even for claims brought under the "equal benefit" and/or like punishment" provisions. Indeed, if there is no "state action" requirement to these provisions of Section 1981, the Pearsons submit that, as with any malicious prosecution types of action, their race-based, federal claims should be permitted to proceed, even if Duck "alone" could not have caused all of their harm. See, Douglas v. Allen, 56 Ohio St. 156 (1897);

Weist v. Toledo Newspaper Co., 182 N.E. 143, 144 (Ohio App. 1930); Bouquette, supra.

A writ of certiorari should be granted to further clarify the substantive federal law regarding the extent to which the "equal benefit" and/or "like punishment" provisions of Section 1981 reach private conduct and to resolve the conflict between the circuits as to whether there is a "state action" component to these provisions of Section 1981.

CONCLUSION

A writ of certiorari should be issued to review the judgment of the Court of Appeals so as to (1) establish that Section 1981 proscribes private conduct, even when that conduct alone may not

cause all of the victim's harm; (2) establish that a private individual may violate the "full and equal benefit" and/or "like punishment" provisions of Section 1981 when he acts in concert with and/or in conspiracy with a state actor; and (3) resolve the split between the circuits as to whether or not these provisions of Section 1981 have a "state action" component.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was forwarded by regular U.S. mail, postage prepaid, to John E. Holcomb and Keith L. Pryatel, MILISOR & NOBLE, 430 Quaker Square, Akron, Ohio 44308, Attorneys for Respondent, on this _____ day of October, 1989.

DENNIS HAINES
Attorney for Petitioner